OCT 25 2002

No. 02-296

IN THE

Supreme Court of the United States

MILFRED NUNEZ,

Petitioner,

v.

CLARENDON AMERICA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Clarendon America Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner, Milfred J. Nunez, is a land-based employee who worked as a dredge dump foreman in the service of a vessel, but who spent less than 10% of his time working aboard the vessel or subject to the unique hazards and perils of the sea. Congress did not intend to confer seaman status to land-based employees, like Nunez, with minimal exposure to the sea. The United States Court of Appeals for the Fifth Circuit, in accordance with the precedent established by this Honorable Court, agreed and found that "Nunez was not a Jones Act seaman."[1] The Fifth Circuit did not err in its finding nor does its finding conflict with any decision rendered by the Third or Ninth Circuit Courts of Appeals.

A. Proceedings Below

On August 28, 1998, Nunez filed suit in the United States District Court for the Eastern District of Louisiana against B&B Dredging, Inc. ("B&B") and its insurer, Clarendon America Insurance Company ("Clarendon"), alleging negligence under the Jones Act and General Maritime Law.[2] The Respondent, Clarendon, moved for summary judgment on August 9, 1999, arguing that the undisputed facts attained in Nunez's deposition established that he was not a seaman as a matter of law within the meaning of the Jones Act.[3] Nunez filed an opposition memorandum and attached a "Statement of Contested Facts," in which he outlined several self-serving facts that directly contradicted his deposition

1. Pet. App. A at 1a.

2. R. 263, 268.

3. R. 120, 127-131.

testimony.[4] Nunez claimed these facts, extracted from his affidavit, were material to the seaman status dispute. The trial court denied Clarendon's motion, finding material facts were in dispute.[5]

Upon the trial court's invitation, Nunez then filed his own motion for summary judgment on seaman status. Nunez offered the same self-serving affidavit testimony as uncontested material facts supporting a finding of seaman status.[6] The trial court granted Nunez's motion for summary judgment, effectively holding that the seaman status test in *Chandris* was disjunctive and thereby ignoring the temporal requirement.[7] Clarendon appealed to the United States Court of Appeals for the Fifth Circuit.[8]

The Fifth Circuit held that

> [f]or a worker such as Nunez who divides his work time between the shore and the vessel, he must demonstrate that he spends a substantial part of his work time aboard the vessel in order to demonstrate that he has the requisite connection to a vessel in order to qualify for seaman status.[9]

The Fifth Circuit found that Nunez's time aboard the vessel was an insubstantial part of his work time and that he did

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4. R. 52, 74.

5. R. 25.

6. R. 699-707.

7. R. 658-666.

8. R. 847.

9. Pet. App. A at 8a.

not, therefore, qualify as a seaman as a matter of law.[10] Because the Court found Nunez's contradictory affidavit testimony did not create a genuine issue of material fact to justify a trial, judgment was rendered in favor of B&B. Nunez's Motion for Reconsideration was denied, and he filed the present Petition.

B. The Material Facts Support the Singular Conclusion that Nunez is NOT a Seaman

The only evidence before the trial court and the Fifth Circuit relating to Nunez's seaman status was his deposition testimony and a contradictory, self-serving, and conclusory affidavit drafted *after* Nunez's deposition. Nunez was employed by B&B for approximately two years (twenty-three months) prior to his accident.[11] Approximately fifteen months of this time was spent on vessel construction and yard work, during which time Nunez spent 100% of his time on land.[12] During the remaining eight months with B&B, Nunez spent 90% of his time working on land.[13]

A chronological view of Nunez's work history with B&B, derived from Nunez's deposition testimony, establishes unequivocal support for a finding that Nunez barely worked on vessels during his employment and as such is not entitled to the protection afforded seaman regularly exposed to the perils of the sea:

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10. *Id.*

11. R. 318.

12. *See* Nunez's Deposition, R. 334-339, 365-366.

13. *See* Nunez's Deposition, R. 354, 359, 369, 373.

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10. *Id.*

11. R. 318.

12. *See* Nunez's Deposition, R. 334-339, 365-366.

13. *See* Nunez's Deposition, R. 354, 359, 369, 373.

- **3 Months:** working 90% on land for Continental Grain job.
- **2 Months:** working 100% on land, repairing drill pipe in a yard.
- **10 Months:** working 100% on land, construction of DREDGE BATON ROUGE.
- **7 Weeks:** working 90% on land at dredge spoil site, maiden voyage of vessel.
- **1 Month:** working 100% on land, repairing slings and pontoons.
- **8 Weeks:** working 90% on land, dump foreman at dock site.
- **1 Month:** working 100% on land, securing supplies for dredge operation.
- **2 Weeks:** "Off Work" while dredge towed to Florida job.
- **1 Month:** working 100% on land, laying drill pipe on land; awaiting arrival of vessel in Florida.
- **2 Months:** working 90% on land, dump foreman 10 miles from dredge in Florida.[14]

For the eight months in which Nunez was not *100% of the time on land*, he performed *90% of his work on land* as a dredge dump foreman. Nunez described his dump foreman job duties as monitoring the land-based dredge spoil area and adding additional segment to the dredge pipe to begin a new pile of dredge spoil on land.[15] Nunez's land based duties

14. For a more detailed narrative of Nunez's employment history with B&B, *see* Nunez's Deposition, R. 318-381.

15. Nunez's Deposition, R. 323-325.

also included driving a truck for four to five hours a day or overlooking the land construction site.[16]

At the Florida job where Nunez sustained his injury, Nunez testified that he spent 90% of his time as the dump foreman at the dredge spoil site located *ten miles* from the DREDGE BATON ROUGE.[17] The remaining 10% of Nunez's working day was spent traveling across water for 10-15 minutes a day to receive instructions from his supervisor or occasionally to eat meals aboard the vessel.[18] Nunez resided at a Quality Inn for this job and ate most of his meals at the land-based dredge spoil site.[19]

After his deposition, Nunez executed an affidavit aimed directly at contradicting his own deposition testimony.[20] In this affidavit, Nunez repeatedly referred to himself as a "member of the crew" of B&B vessels.[21] This is clearly a

16. Nunez's Deposition, R. 342-344.

17. Nunez's Deposition, R. 373.

18. Nunez's Deposition, R. 412.

19. Nunez's Deposition, R. 381.

20. Nunez's Deposition, R. 110 or 738.

21. *Id.* The phrase "member of the crew" is synonymous with Jones Act Seaman status. The term "member of the crew" was initially defined in the context of the LHWCA in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941). Since that time, it has become clear that the phrase "member of the crew" is synonymous with the term "seaman" and courts have "universally recognized" the *Carumbo* definition of the term. *Chandris*, 515 U.S. at 364-67, 115 S. Ct. at 2188-89.

legal conclusion that carries no weight in the determination of seaman status. Nunez claims, contrary to his deposition testimony, that he spent 10 to 60 percent of his time on a vessel while working on B&B projects. Nunez also retracted his deposition testimony regarding his excursions to the dredge vessel, claiming his trip to the vessel took not 10-15 minutes a day, but 45 minutes.[22]

Nunez's deposition inquiries and answers thereto were clear and consistent. Nunez provided no explanation for his contradictory and self-serving affidavit testimony. The law of this Honorable Court and of the Circuit Courts is unequivocal that Nunez's affidavit testimony is not sufficient to create a material fact.[23] The court's role at summary judgment stage is to determine if a genuine issue of material fact exists. The Fifth Circuit was clearly exercising its sanctioned discretion in finding that Nunez's affidavit testimony did not create a disputed material fact. Nunez's sworn deposition testimony established sufficient uncontested material facts warranting denial of seaman status. Allowing Nunez to defeat summary judgment by proffering self-serving contradictory evidence would create a manifest injustice and render the summary judgment procedure untenable.

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22. Deposition, R. 412; Affidavit, R. 110.

23. *See* footnote 42, *infra*, and accompanying text.

REASONS FOR DENYING THE PETITION

A. The U.S. Fifth Circuit Correctly Applied the Law

"A maritime worker who spends only a small fraction of time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." *Chandris*, 515 U.S. at 371, 115 S. Ct. at 2191. This axiom governs the analysis of Nunez's seaman status.

This Honorable Court delineated a two-prong test to determine whether an employee is a seaman within the meaning of the Jones Act in *Chandris, Inc. v. Latsis*:[24]

1. First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.

2. Second . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Chandris, 515 U.S. at 368, 115 S. Ct. 2172.

This test was reiterated and affirmed in *Harbor Tug and Barge Co. v. Papai*,[25] in which this Court clarified the identifiable fleet doctrine. This Court held:

> For the substantial connection requirement to serve its purpose, the inquiry into the *nature* of the

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24. 515 U.S. 347, 368, 115 S. Ct. 2172, 2190 (1995).

25. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997).

> employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the *duration and nature* of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.[26]

This Court did not retract the temporal requirement created in *Chandris*, nor did this Court hold that if an employee works 100% of his time in the service of a vessel, but on land, that he is a seaman. *Harbor Tug* highlighted the importance of the nature of an employee's duties to the service of a vessel in satisfying the substantial connection requirement.

Realizing his inability to meet the temporal requirement mandated by this Court in *Chandris*, affirmed in *Harbor Tug*, and adhered to by the Fifth Circuit, Nunez attempts to evade the fact that he had no substantial connection in duration to B&B vessels. To accomplish this feat, Nunez attempts to: (1) circumvent the durational/temporal element of the seaman test by arguing that 100% of his time was "in the service of the vessel"; and (2) create a conflict in the Circuits where one does not exist.

To satisfy the first prong of the *Chandris* test, a worker need only show that he performs the ship's work.[27] This threshold requirement has been characterized as "very broad."[28] Clarendon does not dispute that as a dump foreman, monitoring the silt

26. *Id.* at 555.

27. *Chandris*, 515 U.S. at 368, 115 S. Ct. 2172.

28. *Id.*

discharged from dredge pipe, even a dredge line which runs ten miles from the dredge, is work which might fairly be characterized as the dredge's work. Nunez's seaman status will, therefore, hinge on the second prong of the *Chandris* test.

The second prong of the *Chandris* test is intended to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation."[29] As this Court reasoned in *Chandris*:

> The total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon. . . . The duration of the worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Chandris, 515 U.S. at 370 (citations omitted).

Although Nunez attempts to argue otherwise, the temporal aspect of a seaman's connection to a vessel in navigation is essential. This court was unequivocal in its holding that an employee, in addition to working "in the service of the vessel", must have a substantial connection to

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29. *Id.*

the vessel **both** in terms of nature and duration. This requirement determines which employees eligible under the first prong or element of the *Chandris* test are entitled to the benefits conferred upon seaman. This temporal element is separate from the *nature* of the employee's work and must also comprise a substantial portion of the employee's job. To satisfy this temporal requirement, the employee must spend a substantial part of his work time aboard the vessel. Nunez cannot ignore this Court's clear directive that a seaman's connection to a vessel must be substantial in duration. This Court stated:

> We agree with the Court of Appeals that seaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.

Chandris, 515 U.S. at 372.

To accept Nunez's argument that if a worker performs 100% of his work in the service of the vessel, even if on land, then he is a seaman, this Court must remove the temporal requirement established in *Chandris* and delineate a new directive for seaman status. As noted by the Fifth Circuit, adopting Nunez's interpretation would "expand the ranks of potential Jones Act seaman to all employees who further the mission or function of the vessel from salesman to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result."[30]

30. Pet. App. A at 8a.

Nunez's own admissions support the singular finding that his sea-faring activities do not satisfy the substantial temporal requirement of the *Chandris* test. Nunez's excursions to the DREDGE BATON ROUGE were simply to report the status of the land-site and to receive instructions from crew members aboard the vessel. Like the employee in *Harbor Tug*, the nature of Nunez's connection to the vessel was not substantial for seaman-status purposes: Nunez did not go to sea aboard the vessel, nor did he perform any regular job duties aboard the vessel during his trips to the anchored vessel. Nunez did not face regular exposure to the perils of the sea. The Fifth Circuit has consistently denied seaman status to employees whose service to a vessel encompassed more substantial time aboard a vessel, performing more traditional sea-farer duties.[31]

The Fifth Circuit, adhering to its established precedent as sanctioned by this Honorable Court, refused to extend the protection afforded seaman to Nunez, who clearly does not fall within the class of persons sought to be protected by the Jones Act. The Fifth Circuit has repeatedly held that seaman status should be denied to employees who spend less than 30% of their time on vessels.[32]

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31. *See* footnote 35, *infra*.

32. *See Barrett v. Chevron, Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986) (en banc) (denying seaman status to an employee who spent less than 20 to 30% of his time working on vessels); *see, e.g., Palmer v. Fayard Moving and Transportation Corp.*, 930 F.2d 437, 439 (5th Cir. 1991) (denying seaman status to a plaintiff who performed 19% of her work on a vessel even though her duties included frequent trips to the vessel to order food and beverages and prepare the vessel for voyages); *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1998) (denying seaman status to a welder who spent 14% of his time working on vessels).

This Honorable Court has sanctioned the Fifth Circuit's interpretation of the temporal element of the *Chandris* test, finding:

> Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.[33]

B. There Were No Genuine Issues of Material Fact

It is generally recognized that seaman status is a mixed question of law and fact which in the ordinary course should not be taken from the jury. *Harbor Tug & Barge Company v. Papai*, 520 U.S. 548, 117 S. Ct. 1535, 1540 (1997). Nevertheless, this Court has held that "[s]ummary judgment . . . is mandated where the facts and the law will reasonably support only one conclusion."[34] Similarly, the Fifth Circuit has held that where there is no reasonable evidentiary basis to support a jury finding that the injured worker is a seaman, summary judgment denying seaman status is proper.[35]

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33. *Chandris*, 515 U.S. at 372.

34. *Id.* at 371 (quoting *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

35. *Lormand v. Superior Oil Company*, 845 F.2d 536, 539-40 (5th Cir. 1987), citing *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007 (5th Cir. 1986); *Reynolds v. Ingalls Shipbuilding Division*, 788 F.2d 264, 267 (5th Cir.), *cert denied*, 107 S. Ct. 278, 93 L. Ed. 2d 253 (1986); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1959).

And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict.[36]

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37] The party seeking summary judgment bears the burden of establishing the absence of any disputed material fact.[38] At summary judgment stage, the judge's function is not himself to read the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.[39] Although the court must resolve all factual inferences in favor of the nonmovant, the nonmovant cannot manufacture a disputed material fact where none exists.[40]

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36. *See, e.g., Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 439 (5th Cir. 1991).

37. Fed. R. Civ. P. 56(c).

38. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

39. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511, 477 U.S. 242, 249, 91 L. Ed. 2d 202 (1986).

40. *Albertson's v. T.J. Stevenson Co., Inc.*, 749 F.2d 233 (5th Cir. 1984), citing *Russell v. Harrison*, 736 F.2d 283, 387 (5th Cir. 1984).

The nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony.[41] The nonmovant cannot manufacture a disputed material fact where none exists.[42] As this Honorable Court has noted, the Circuit Courts

> have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.[43]

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41. *Id.*, *citing Kennett-Murray Corp. v. Vone*, 622 F.2d 887, 894 (5th Cir. 1980). *See also Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); *Vanlandigham v. Ford Motor Co.*, 99 F.R.D. 1, 3 (N.D. Ga. 1983).

42. *Id.*, citing *Russell v. Harrison*, 736 F.2d 283, 287 (5th Cir. 1984).

43. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597, 1603, 143 L. Ed. 2d. 966 (1999), citing *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1944); *Rule v. Brine, Inc.*, 85 F.3d 1001, 1002 (2d Cir. 1996); *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *Albertson's v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *Davidson & Jones Development Co. v. Elmore Development Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-1366 (8th Cir. 1983); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953-954 (11th Cir. 1986); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (C.A.D.C.), *cert. denied*, 502 U.S. 822, 112 S. Ct. 85, 116 L. Ed. 2d 57 (1991); *Sinskey v. Pharmacia Opthalmics, Inc.* 982 F.2d 494, 498 (C.A. Fed. 1992), *cert. denied*, 508 U.S. 912, 113 S. Ct. 2346, 124 L. Ed. 2d 256 (1993).

Nunez submitted affidavit testimony that could not be reconciled with his deposition testimony. Without explanation, this presentation of a self-serving affidavit cannot and did not create a genuine issue of material fact.

Upon reviewing a summary judgment, the Fifth Circuit is granted the discretion to determine if a genuine factual issue exists or if the evidence presented is of insufficient caliber to allow a rational finder of fact to weigh the evidence. Federal Rule of Civil Procedure 56(c) by its very terms provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no *genuine* issue of *material fact*. Under this Court's jurisprudence, *Cleveland*, *supra*, the district court had no credible basis to find a genuine issue of material fact. The Fifth Circuit correctly found that Nunez's self-serving affidavit did not create a genuine issue of material fact sufficient to prevent summary judgment, and properly reversed and remanded judgment in favor of B&B.

C. There is No Conflict Among the Circuits

Nunez asserts that the Fifth Circuit failed to properly apply the *Chandris* test, thereby establishing a conflict with the Third and Ninth Circuits. Contrary to this assertion, both Circuits interpret and apply the *Chandris* test similarly to the Fifth Circuit.

1. The Third Circuit's Application of *Chandris* and *Papai*

Nunez directs this Court to the Third Circuit case of *Shade v. Great Lakes Dredge & Dock Co.*[44] in a failed attempt to analogize his work duties with that of the *Shade* plaintiff, who was assigned to a vessel and worked primarily on the water. The *Shade* plaintiff worked on the water assisting the repair of a submersible dredge line while assigned to an anchor barge. Both the *Shade* plaintiff and his supervisor testified that plaintiff was employed primarily on navigable waters, spending 90% of his time on the water. This stands in stark contrast to Nunez's deposition testimony that he spent less than 10% of his time on board the vessel.[45] The employer in *Shade* appealed the trial court's denial of his motion for summary on seaman status claiming that under the first prong of the *Chandris* test, the fact finder must only consider activities of an employee at the time of his injury. Shade's employer argued that the plaintiff failed to satisfy the seaman status test because he was injured while working on the shore. The Third Circuit found that the fact finder must not confine its analysis to an employee's duties only at the time of the accident, but must include all duties performed during an employee's assignment with his current employer. The Court found that the plaintiff presented sufficient evidence that he contributed to the function of the vessel and spent a considerable amount of time working on the water as a deckhand to support a finding hat he satisfied *both* the first and second prongs of the *Chandris* test. Unlike the Fifth Circuit in Nunez, the Third Circuit found sufficient evidence

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44. 154 F.3d 143 (3d Cir. 1999).

45. *See* Nunez's deposition, R. 354, 359, 369, 373.

to satisfy each prong of the seaman status test and held the district court correctly denied the employer's motion for summary judgment.[46]

The Third Circuit did not find, as Nunez contends, that a primarily land-based employee satisfied either prong of the *Chandris* test nor did the Court ignore the temporal requirement of the *Chandris* test.[47] The Third circuit noted "[i]n addition, the second portion of the test contains a **direct measurement** of time through its durational element."[48] The Third Circuit's seaman status analysis accords with that of the Fifth Circuit. In fact, the Third Circuit specifically references several Fifth Circuit seaman status decisions as support for its interpretation and application of *Chandris*.[49] Nunez's argument that the Third Circuit's application of the seaman test to his facts would render a different result than the Fifth Circuit's fails.

By referencing *Foulk v. Donjon Marine Co., Inc.*,[50] Nunez attempts to align himself with an employee whose

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46. The Third Circuit ultimately reversed the trial court's decision because the trial court improperly admitted evidence of prior employment history. The case was remanded for a new trial. *Id.* at 155.

47. Nunez's Petition misstates the *Shade* plaintiff's employment conditions: "[p]laintiff - Shade . . . was *primarily a shoreman*. . . ." Pet. App. p. 12. (emphasis added)

48. *Shade v. Great Lakes Dredge & Dock, Co.*, 154 F.3d 143, 147 (3d Cir. 1999).

49. *Shade*, 154 F.3d at 149.

50. 144 F.3d 252 (3d Cir. 1997).

work was maritime in nature and who was exposed to the perils of the sea the majority of his relevant employment. The *Foulk* plaintiff was a commercial diver, and it was undisputed that his work contributed to the function of the vessel and that his connection to the vessel was substantial in its nature. The *Foulk* plaintiff was injured on the first day of a ten day dive assignment. If the ten day job had been completed, the *Foulk* plaintiff would have spent 100% of his assignment on a vessel or in the water. The district court held that ten days was a "clearly inadequate temporal connection to vessels in navigation, sufficient to take the question from the jury by granting summary judgment." The Third Circuit reversed and held that ten days may be sufficient to satisfy the second prong of the *Chandris* test, and the determination should, therefore, be heard by a jury.

Unlike *Foulk*, the length of employment is not an issue in the case at bar. What is at issue is the time Nunez spent while employed with B&B aboard vessels performing maritime work as opposed to on land. Nunez cannot be compared to the traditional maritime worker in *Foulk* who spent 100% of his working time performing traditional maritime work in the service of a vessel either aboard a vessel or in the water. The *Shade* and *Foulk* cases do not present a conflict between the Third and Fifth Circuits, and Nunez's attempt to manufacture such a conflict fails upon a fair reading of the Third Circuit's jurisprudence.

2. The Ninth Circuit's Application of *Chandris* and *Papai*

Nunez argues that the Ninth Circuit's interpretation of the seaman status test post-*Papai* creates a conflict with the Fifth Circuit and, if applied to the present facts, would

necessitate a finding that Nunez is a Jones Act seaman. Specifically, Nunez argues that the Ninth Circuit's holding that "a worker's duties take him to sea if they are 'inherently sea-based activities'" is determinative of seaman status and precludes any temporal analysis by the Court. This assertion is not consistent with the Ninth Circuit's application of *Chandris* and *Papai* and directly contradicts the conjunctive test established by this Court.

Nunez represents that the Ninth Circuit condones an interpretation that the substantial temporal requirement of *Chandris* is satisfied if a worker's duties, however infrequent, take him to sea. This is a mis-characterization of the Ninth Circuit's jurisprudence. The Ninth Circuit considers whether an employee's duties take him to sea for the substantial connection in nature element of the seaman status test, not for the temporal requirement. "Whether the **nature** of a connection is substantial depends primarily on . . . whether the worker's duties take him to sea."[51] Like the Fifth Circuit, the Ninth Circuit assesses the substantiality of an employee's connection to a vessel in time by calculating the percentage of working time spent on vessels. "Whether the **duration** of a connection is substantial depends largely on the percentage of working time spent on vessels for the employer in question."[52]

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51. *Lorimer v. Great Lakes Dredge & Dock Co.*, 2002 U.S. App. Lexis 10775 (9th Cir. 2002), citing *Harbor Tug*, 520 U.S. at 555, 117 S. Ct. 1535.

52. *Lorimer v. Great Lakes Dredge and Dock Co.*, 36 Fed. Appx. 294, 295, 2002 WL 1164100, *1 (9th Cir. 2002), citing *Harbor Tug*, 520 U.S. at 556-57, 117 S. Ct. 1535; *Chandris*, 515 U.S. at 371-72, 115 S. Ct. 2172. The *Lorimer* plaintiff spent 100% of his working

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Plaintiff cites *Delange v. Dutra Construction Co.*[53] in support his argument. In *Delange*, the Ninth Circuit held that a land-based employee who spent 80% of his time working aboard a vessel could maintain a supplemental Jones Act claim in addition to his LHWCA claim. *Delange* presents another case in which the plaintiff actually worked on board a vessel. As the Ninth Circuit noted, Delange spent 80% of his time on board the barge, performing crewman and deckhand duties.[54] The Ninth Circuit reversed the trial court's finding that the plaintiff failed to satisfy the requirement that his duties contributed to the function of the vessel or to the accomplishment of its mission because the ultimate purpose of his work was relating to construction. The Ninth Circuit found that the plaintiff worked directly in the service of the ship, that a reasonable jury could find these facts supported seaman status, and remanded the cause for trial.

(Cont'd)
time on board the dredge vessel, which starkly contrasts Nunez's time aboard B&B vessels. *Id.* The Ninth Circuit specifically referenced the 30% rule in a recent unpublished opinion. "We reject [plaintiff's] argument that he satisfied the 30 % 'rule of thumb' established in *Chandris*." *Gipson v. Kajima Engineering and Construction, Inc.*, 173 F.3d 860, *1 (9th Cir. 1999), citing *Chandris*, 515 U.S. at 371.

53. 183 F.3d 916 (9th Cir. 1999).

54. The Ninth Circuit's reference to the percentage of time Delange spent on board the vessel (80%) contradicts any implication that the Ninth Circuit's analysis does not account for a comparison of the employee's time on land versus his time on board a vessel in navigation.

In conclusion, *Delange*, like *Shade* and *Foulk* from the Third Circuit, applies the temporal requirement similar to the Fifth Circuit. What distinguishes all of these cases from Nunez is that each of those plaintiffs satisfied the 30% rule of thumb. Therefore, the Circuit decisions were based upon other factors delineated in the *Chandris* test. The *Chandris* test is a conjunctive test. Nunez failed to satisfy one prong of the test rendering further analysis moot. Nunez cannot satisfy the temporal requirement by claiming that his duties took him to sea. That inquiry is reserved for the first prong of the *Chandris* test. Nor can Nunez satisfy the temporal requirement by submitting contradictory self-serving statements to rebut his deposition testimony.

Without any real support from any jurisprudence in the nation, Nunez asks this Court to ignore the substantial duration requirement of the *Chandris* test and find that an employee is a seaman if his work contributes to the function of the vessel. To remove this element would render the first and second prongs of *Chandris* redundant and would not serve the goal of separating seafarers from land-based employees. Contrary to the Petitioner's argument, neither the Third nor the Ninth Circuit has eschewed the temporal requirement or reversed the grant of summary judgment for any claimant akin to Nunez.

Nunez's attempt to retract his deposition testimony and paint his land-based employment in a different light is at best a misrepresentation. It does not create an issue of fact. In the discretion granted it by both *Anderson* and *Celotex*, the Fifth Circuit refused to find Nunez's contradictory evidence material. Nunez's appeal to this Court to overturn the decision of the Fifth Circuit based on a tortured interpretation of the Third and Ninth Circuit's application of

the *Chandris* test to anomalous fact patterns is untenable and should be rejected. This Court has approved of the Fifth Circuit's consistent interpretation of the substantial duration requirement. A fair reading of the Third and Ninth Circuit decisions is consistent with this Court's jurisprudence and the Fifth Circuit's application of the *Chandris* test in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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